

**MINUTES OF THE  
ELEVENTH REGULAR MEETING OF THE  
2001 REAPPORTIONMENT COMMISSION**

**October 11, 2001  
2:00 p.m.**

**Hawaii State Capitol  
Room 329  
Honolulu, Hawaii**

**Commissioners in Attendance:**

Mr. Wayne K. Minami, Chairperson  
Mr. Deron K. Akiona  
Ms. Jill E. Frierson  
Ms. Lori Hoo  
Mr. Shelton Jim On  
Mr. Lynn C. Kinney  
Mr. Kenneth T.G. Lum  
Mr. Harold Masumoto  
Mr. David Rae

**Advisory Council in Attendance:**

Mr. Stephen Goodenow, Oahu  
Mr. Jim Hall, Oahu  
Ms. Geal Talbert, Oahu  
Mr. Robert Ogawa, Oahu  
Ms. Shirley Spencer, Hawaii  
Mr. Fred Rohlfing, Maui  
Ms. Madge Schaefer, Maui  
Mr. Mark Andrews, Maui  
Mr. Jerome Hew, Kauai  
Ms. Betty Chandler, Kauai  
Ms. Trinette Kauai, Kauai

**Technical Support Staff in Attendance:**

Mr. Dwayne D. Yoshina, Office of Elections  
Mr. David Rosenbrock, Office of Elections/Reapportionment Staff  
Mr. Lawrence Chun, Office of Elections/Reapportionment Staff  
Ms. Cynthia Fukunaga, Office of Elections/Reapportionment Staff  
Mr. Strather Ing, Office of Elections/Reapportionment Staff  
Ms. Keala Naluai, Office of Elections/Reapportionment Staff  
Mr. Rex Quidilla, Office of Elections  
Mr. Scott Nago, Office of Elections

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Mr. Brian Aburano, Department of the Attorney General  
Mr. Aaron Schulaner, Department of the Attorney General

**Observers Present:**

Ms. Jean Aoki, League of Women Voters  
Mr. Pat Omandam, Honolulu Star Bulletin  
Ms. Lynne Matusow, Downtown Neighborhood Board  
Rep. Chris Halford, House of Representatives  
Mr. Kevin Dayton, Honolulu Advertiser  
Mr. Bert Warashina, Senate Office  
Ms. Shannon Wood, The Koolau News  
Ms. Brandi Lau, Representative Morita Office  
Mr. Glen Takahashi, City Clerk Office  
Ms. Linda Lingle, Hawaii Republican Party  
Sen. Sam Slom, State Senate  
Mr. Ken Fujinaga, Representative Hamakawa Office  
Rep. Barbara Marumoto, House of Representatives  
Ms. Roberta Weatherford, Representative Leong Office  
Ms. Karen Kinney, Observer  
Mr. Lester Fung, Representative Yoshinaga Office  
Mr. Terrance Aratami, Observer  
Mr. Kaliko Chun, Senator L. Inouye Office  
Mr. Clifton Takamura, McCully/Moiliili Neighborhood Board  
Mr. Bob Carter, Senator Hemmings Office  
Ms. Barbara Hale, Representative Hale Office  
Ms. Laura Figueira, Senate Office  
Ms. Poni Daines, Senator Taniguchi Office  
Mr. Mona Kapaku, Representative Bukoski Office

**I. Call to Order**

Chairperson Wayne Minami called the Eleventh Regular Meeting of the 2001 Reapportionment Commission to order at 2:12 p.m. in Conference Room 329 of the Hawaii State Capitol, Honolulu, Hawaii.

**II. Approval of Minutes**

Commissioner Lynn Kinney moved to have the minutes of the Tenth Regular Meeting of the 2001 Reapportionment Commission on October 4, 2001 approved. Commissioner Deron Akiona seconded the motion. The motion was carried unanimously by the Commissioners in attendance.

**PROCEEDINGS**

**III. Technical Committee Presentation**

The Technical Committee had no presentation at this time.

**IV. Advisory Councils Testimony**

**A. Testimony by Mr. Steve Goodenow, Oahu Advisory Council Member**

Mr. Goodenow testified to the Commission his thoughts and feelings regarding the issues of Canoe Districts and counting military dependents in the population base.

1. Mr. Goodenow supports the possible compromise that the Commission staff has presented that may eliminate canoe districts as long as it does not disrupt those communities that have worked hard with the Commission to remain intact while the boundary lines were being drawn.
2. Mr. Goodenow strongly objects to removing military dependents from the state population base. The Commission has the vital responsibility of determining the resident population base. He reminded the Commission why they decided to include the dependents of non-resident military in the first place. The main reason being that there was no exact way of locating the dependents to extract them from the census tracts.
3. Mr. Goodenow listed many reasons as to why dependents of non-resident military should not be excluded from the population base:
  - a. There has been no method established that clearly identifies the census blocks where military dependents reside.
  - b. There is no way to tell with any degree of certainty that military dependents are not registered voters who chose, unlike their spouses, to vote in Hawaii.
  - c. Children of non-residents military who reside in Hawaii are no different than children of adults who we count as permanent residents.
  - d. Your job is to determine a permanent resident base. "I've looked at many definitions of permanent residence and I fail to see where military dependents don't come under these definitions."
  - e. If the dependents of military personnel are excluded, the districts that will be affected will have to deal with the issues of a larger population. The representative would have to represent the determined population base

as well as the additional persons on the military bases. They would still have to be represented.

- f. There have been legal arguments on both sides of the issue. The bottom line is that the Commission has a choice.

Mr. Goodenow stated that the State legislature must properly be configured to reflect the presence of military dependents; otherwise 5% of the total population will be disenfranchised.

**B. Testimony by Mr. James V. Hall, Oahu Advisory Council Member**

1. Mr. Hall testified that the issue of the dependents of non-resident military personnel should not be an issue at all because there seems to be an intent by a number of groups; including voters, the 1991 Reapportionment Commission, the 1991 legislature that crafted the proposed constitutional amendment, and the legislature that crafted HRS §11-13; that they should not be included in the state legislative population base for the reapportionment process.
2. Mr. Hall refuted the claims of the previous testimony saying that; 1) there was never a case when military dependents were ever included into the Hawaii state legislative population base, 2) there is a definition of permanent residents regarding military dependents in HRS §11-13, and 3) military dependents have the choice of whether or not to establish residency different from their military members, therefore including the military dependents without knowing their intent would be wrong.
3. With the issue of eliminating canoe districts, the Commission would have to demonstrate in their final report that they are following a rational state plan while also providing an equitable balance in the legislature so that every person has equal representation no matter where they reside and then back it up with relevant statistics.

**V. Public Testimony**

**A. Testimony by Mr. Clifton Takamura, McCully/Moiliili Neighborhood Board**

Mr. Takamura stated that he supports the non-canoe plan that the Commission is considering.

He also stated that the McCully/Moiliili neighborhood board is still strongly opposed to the Bingham tract and Manoa being placed in the same district. The neighborhood board commission decided that the redistricting would not affect the neighborhood board districts as they will remain the same regardless. The neighborhood board is considering adopting their own reapportionment

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procedures within their own sub district because the state and county districts are being redrawn.

Mr. Takamaura stated that he would like to request that the Commission not change the district numbers in the Senate and House Legislature. Please keep the numbers the same.

**B. Testimony by Ms. Shannon Wood, The Ko'olau News**

Ms. Wood stated that she supports the inclusion of all people in the population base. She said that it is not right to exclude the dependents of non-resident military personnel because there are many towns that are dependent upon the military for everything from the H-3 to direct employment of more than 10,000 local residents in non-Department of Defense jobs throughout Windward Oahu.

Ms. Wood also mentioned that she received a press release from the office of Senator Daniel Inouye stating that the State of Hawaii will be receiving more than \$77 million for the labor, health and education initiative. She said that the Senate Appropriations Committee has approved \$77.72 million in funding for labor, health and education programs in Hawaii. She quoted from a press release that, "Impact Aid, \$39.2 million. Hawaii's impact funding is part of a larger amount recommended by the Congress for impact aid programs nationwide. The program provides support for school districts with students who are children of members of the armed forces and federal government employees, as well as other children for whom the federal government has primary responsibility." Ms. Wood explained that there is nothing mentioned that the children have to belong to a family that is represented. Most non-military federal employees in the state of Hawaii are residents of Hawaii. Ms. Wood emphasized that after speaking with the Senator's Office that residency is not a requirement to receive federal aid.

Ms. Wood again urged the Commission not to exclude the military dependents.

**VI. Decision Making**

**A. Reconsideration of Population Base**

1. Motion for the Commission to reconsider the inclusion of the dependents of non-resident military in the population base.

Chairperson Minami moved that the Reapportionment Commission reconsider its decision to include dependents of non-resident military in the population base that it will use to reapportion and redistrict the state legislative districts. Commissioner Frierson seconded the motion.

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Discussion:

- a. Commissioner Masumoto asked to make an amendment to the motion.

Commissioner Masumoto moved to include active duty military personnel along with their dependents who have Hawaii zip codes in the population base. Commissioner Masumoto explained by arguing that the Commission does not have adequate information to extract the military population from the census tracts. The Commission only has zip code information for the military personnel and their dependents. Commissioner Masumoto stated that this is not enough information to extract them from the population base and therefore argues for representation for all military personnel and their dependents in the population base.

Commissioner Masumoto said that the focus of apportionment is representation according to the 1984 Reapportionment Commission final report, page 20. He noted that those who may not vote are still entitled to representation, most notably aliens and minors. Thus, though they may not vote, he argued that active duty military personnel and their dependents were entitled to representation.

In summary Commissioner Masumoto stated his position:

- There is conflict between the provisions of the U.S. Constitution and the provisions of the State Constitution.
- The proposed methods to reconcile the conflict fail because of inadequate information and different standards for exclusion.
- The conflict not being resolved adequately, the U.S. Constitution should prevail.
- The Hawaii State 2001 Reapportionment Commission should join the rest of the nation in using total population as the reapportionment base.

(For more detail of Commissioner Masumoto's statement, written copies of his statement are available at the Commission office.)

- b. Commissioner Lori Hoo asked the Deputy Attorney General if what Commissioner Masumoto said was true, i.e., that Hawaii along with Kansas are the only states that do not utilize total population for their state's reapportionment. Mr. Brian Aburano stated that he had not done an analysis of all 50 states. However, according to what he has seen in cases and material he reviewed, Hawaii is one of 2-3 states, maybe the only state, that does not apportion by total population.

- c. Commissioner Akiona asked the Deputy Attorney General if the other states' population bases were determined by their reapportionment commissions, their legislatures, or by their constitutions. Mr. Aburano said that he had not researched all 50 states. He presumed that in most cases it would be in their state constitution or state statutes, but could be a decision made by their reapportionment commissions.
- d. Commissioner Shelton Jim On made a point of order that with respect to the amendment made by Commissioner Masumoto, it seems to contradict the motion to reconsider the population base.
- e. Commissioner Masumoto begged to differ and said that he is moving to reconsider the population base and propose to include the active duty military personnel in the population base as one motion.
- f. Commissioner Frierson begged to differ and stated that the motion to reconsider the population base was one motion. If that was approved, the Commission members could make a motion to do whatever they wanted to change the population base. She stated that the Commission has to agree to talk about such changes first.

Chairperson Minami called for a vote on the motion to reconsider the Commission's decision to include the dependents of non-resident military in the population base.

Roll Call:

Commissioners Akiona, Frierson, Jim On and Lum and Chairperson Minami voted in favor of the motion. Commissioners Hoo, Kinney, Masumoto and Rae voted against the motion. With a five (5) to four (4) vote for the affirmative, the motion carried.

The Commission will reconsider its decision to include the dependents of non-resident military in the reapportionment population base.

2. Motion to include military personnel.

Commissioner Masumoto moved to include all active duty military personnel along with their dependents who have Hawaii zip codes in the reapportionment population base for the reasons previously indicated. Commissioner Rae seconded the motion.

Discussion:

- a. Commissioner Akiona asked to clarify if the inclusion of active duty military personnel in the population base included the military personnel

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that have declared themselves to be non-residents. Commissioner Masumoto answered in the affirmative.

- b. Commissioner Frierson asked for a point of verification and asked if the military who are in fact residents are being isolated. Commissioner Masumoto said that there should be no isolation for those who there are no exact addresses for. Commissioner Rae attempted to clarify Commissioner Masumoto's motion. He said that the motion is trying to include that group that was previously excluded, which are active duty military who declared residency in another state, but who cannot be legitimately be removed from the population base because there is insufficient data to do so.
  - c. Commissioner Jim On made a point of order that the appropriate course is to reconsider the Commission's decision to exclude the non-resident military. He stated that Commissioner Masumoto's motion is based on two issues, one of reconsidering the Commission's decision with respect to the exclusion of military dependents and the other is to include the active duty military. Commissioner Jim On argued that the appropriate course of action should be to make a motion to reconsider the motion previously made with respect to the exclusion of the military dependents.
  - d. Commissioner Masumoto stated that according to the agenda for today's meeting it is stated that there will be a reconsideration of the population base. He said that he would have assumed that a member of the Commission rather than the Chairperson would have an opportunity to make a motion on that issue first.
  - e. Chairperson Minami stated that the proper way to bring up the issue is to ask for a reconsideration of the Commission's decision on the previous action because they were separate actions. Chairperson Minami decided that the Commission would first take up the issue of including or excluding the military dependents and then take up the issue that Commissioner Masumoto brought up.
  - f. Commissioner Masumoto objected and requested that the Commission take up his motion first. Chairperson Minami declined the request.
3. Motion to exclude the dependents of non-resident military from the population base.

Commissioner Frierson moved that the Commission exclude the dependents of non-resident military - dependents of military members who have declared a place other than Hawaii as their residence - from the population base used for the reapportionment and redistricting of the state legislative districts. Commissioner Jim On seconded the motion.



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Discussion:

- a. Commissioner Frierson stated that this decision is necessary for two reasons; 1) based on merit, which she has always felt, and 2) based on the process that was experienced after the initial decision was made. The need to exclude non-residents and military dependents was very clear to Commissioner Frierson. She mentioned that she was the lone person to vote that way in June. She stated that the State Constitution, statutes and other material indicating legislative and voter intent were very straightforward in her opinion. Others quickly joined the position for exclusion when they were presented with more evidence than what was presented in the beginning. Commissioner Frierson mentioned that she listened to all the arguments for inclusion, but she did not find them to have legal merit.

After entering the public hearing process, Republicans, Democrats, political activists, community organizations, condo boards, county councils, neighborhood boards, chambers of commerce and dozens of individuals came forward at the public hearings. They presented well-organized, mostly polite and non-inflammatory arguments as to why the Commission had made a big mistake in including the dependents of non-resident military. The pleas for fairness from the Neighbor Islands were the most compelling for her.

Commissioner Frierson stated that she suspects both the Democrats and Republicans will experience losses in a plan with no canoe districts and made up of permanent residents. The Neighbor Islands and other areas with few military dependents will gain equality; they will have their fair share for the next 10 years.

- b. Commissioner Rae expressed his gratitude to the entire Commission for the un-rankorous debates within the Commission on the pressing issues, and to the Chairperson for allowing such debates to occur. He stated that he felt that the Commission might not be the final word on those issues. Commissioner Rae complimented the Technical Committee which, despite differences, had brought to the table a very good plan to take to public hearings.

Commissioner Rae mentioned that regardless to today's vote and regardless of the disagreement of the Commission members on the fundamental population base, he believes that the Commission will continue to work in a spirit of cooperation to make a plan that it will be proud of to take to the public.

Commissioner Rae stated his position as to why he does not believe that the dependents of non-resident military should be excluded:

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- The base population is the census. Federal law requires that the congressional representation be based on total population.
- The population base has nothing to do with voting. The process of reapportionment is totally about representation.
- Since more people are included by law, it must be the most fundamental of all rights.
- Everybody is counted in the United States; minors, incarcerated felons, all military and their dependents, non-resident aliens. The people counted in one area in the national census are not counted somewhere else. Therefore, a person who was included in Hawaii's census and is not represented in Hawaii for local representation will not be represented for local representation anywhere.
- What standard must the Commission use to have a person not receive local representation? Only a few states, now maybe only Hawaii, do not use total population. The Hawaii State Constitution states "permanent residents" are to be used for the population base. The Commission has assumed that people who have sworn to be residents elsewhere cannot be included in the base population count. Two groups have been excluded. There was insufficient data to exclude non-resident aliens so they were not excluded from the population count.
- The Commission cannot exclude dependents of non-resident military because it cannot be sure that all of these dependents are non-residents. Therefore, Commissioner Rae asked, how they can be legally excluded? The Commission staff has indicated that the data on military dependents does not contain information showing whether or not they are permanent residents.
- It has been said that the dependents of non-resident military will still be represented even though they are excluded from the reapportionment population base. But, Commissioner Rae said, "That is leaving representation up to the representative. And that is not what the Constitution intends."
- Representation is the right to be weighted, as stated by Commissioner Masumoto previously. It has been said that some people want groups to be excluded so that they may be weighted more heavily. Commissioner Rae asked if that should be done by depriving some groups to be weighted at all. He stated that he believes such a deprivation to be unconstitutional.

- The Commission has been presented with documents purporting to give definitive guidance as to who is a resident of Hawaii. They forget that voter eligibility rules are not relevant. Some persons have pointed out HRS §11-13(6), which states "a member of the armed forces or their dependents are not residents just by being stationed in Hawaii." Commissioner Rae pointed out that HRS §11-13 also states in the introductory paragraph that "in determining residency, a person may treat oneself separate from the person's spouse."
  - Commissioner Rae mentioned that the Commission cannot assume that military dependents are not residents merely because the spouse is not. He believes it would violate the statute and the spirit and intent of the United States Constitution.
- c. Chairperson Minami announced that he will change his vote.

Chairperson Minami stated that he had followed the reasoning indicated by Commissioner Rae that with regards to military dependents, the Commission had no way in knowing whether they were residents or non-residents. He said that he had assumed that the Federal Constitution favored inclusion rather than exclusion.

However, during the public hearings, it became clear to him that what the Commission is really interpreting is the State Constitution. The State Constitution states that the Commission will count "permanent residents". The Commission has tried to determine who are permanent residents. It is clear that non-resident students and military who have declared a residence other than Hawaii could be excluded from the population base. Chairperson Minami stated that with regards to the dependents of the non-resident military, the Commission has said that it is not clear. He mentioned that the Hawaii Revised Statutes have very interesting sections with respect to determining or identifying residents of the State. The section that Commissioner Rae mentioned states that "no member of the armed forces of the United States, the member's spouse or the member's dependent is a resident of this state solely by reason of being stationed in the state." (HRS §11-13)

Chairperson Minami stated that in interpreting the State Constitution, the Commission cannot assume or take the inference that dependents of non-resident military could be residents. The burden falls on the dependents to prove or to do things that will make them a resident. Being in the military does not automatically make them a resident of the State. Chairperson Minami mentioned that he personally does not agree with the State Constitution and thinks that reapportionment should be based on total population. However, he is constrained because there is a constitutional amendment that was voted on that limits the reapportionment base to permanent residents. He felt that the

Commission should follow the State Constitution, and must consider the Hawaii Revised Statutes that interprets who are residents of Hawaii. As a result, he said that he would vote in favor of excluding the dependents of non-resident military.

- d. Commissioner Akiona mentioned that what is unique about the United States is that there is a Federal government and a State government. Differences in issues that the federal law does not incorporate, the states are allowed to decide how to handle those situations. It is clearly stated that in Hawaii there is a definition of "permanent resident" and in that definition it does not automatically place military and their dependents stationed in Hawaii as permanent residents.

He mentioned that what made him change his vote was the 1992 vote that was placed before the people of Hawaii. In a democracy, one needs to look at what the people want. The people voted 2-1 in favor of a constitutional amendment that stated that the population base for the purpose of reapportionment would be "permanent residents". He mentioned that the vote was based on reasoning that "permanent residents" did not include non-resident military dependents. Commissioner Akiona argued that this showed that the people of the State of Hawaii wanted the population base to be "permanent residents" at this time.

Commissioner Akiona stated that his preference would be the same as Chairperson Minami, to use the federal standard and include everybody in the population that was counted in the census. Unfortunately, that is not the law for the State of Hawaii. He suggested that there should be a change brought forward to the legislature and move for a constitutional amendment and place the issue again before the people of Hawaii.

The permanent resident population shift is on the Neighbor Islands and not on Oahu. The plan that the Commission will adopt will be for the next ten years. Commissioner Akiona stated that if the Commission does include the non-resident military dependents in the population base, though they were excluded in the past two reapportionments, there will not be a true reflection that represents permanent residents in the State of Hawaii.

Commissioner Akiona stated that he supports Chairperson Minami's position and will vote accordingly.

- e. Commissioner Jim On stated that at the last meeting he asked the Deputy Attorney General to look at the complete Statutory scheme and look at every statute and regulation to see whether, unlike the tax and voting regulations and unlike the constitutional amendment, there is something that would indicate that non-resident dependents would be included in any type of base. Commissioner Jim On wanted to

understand the statutory scheme for the reapportionment process and reasons for the prohibition and why it was enacted in that way. He stated that after doing his own research, it was his conclusion that the intent of the Hawaii Revised Statutes was that non-resident military dependents would not be included in any type of base, whether it be tax, residency, or voting. He said that he could not find any sort of regulation that came close to recognizing or presuming the inclusion of military dependents. Commissioner Jim On stated that if there is any need to make changes or any need to clarify the State's statutes, then the issues need to be taken up to the legislature and needs to be addressed by every single representative and every single senator - it is not the job of the Commission. The Commission is only there to apply the law as it is stated. For those reasons, Commissioner Jim On stated that he will be voting to exclude the non-resident military dependents.

- f. Commissioner Lum commended Chairperson Minami for his change in vote for the inclusion of military dependents. He mentioned that there were hundreds of opinions regarding the military dependent situation. He said that this is a case of listening to the will of the people. He also mentioned that of all the public hearings that he attended, there wasn't one military dependent that appeared to the Commission to defend their position to be counted. The Commission will go down in history as having done the will of the people.
- g. Commissioner Hoo asked the Deputy Attorney General if the opinion of the Attorney General has changed since going through all of the public hearings and hearing the testimony of the people.

Mr. Brian Aburano stated that the Attorney General's opinion was given after a review by a committee at the Attorney General's office as well as the Attorney General himself. Since those persons have not had the opportunity to review this matter again, he had no authority to change the opinion previously given. Mr. Aburano stated that his personal opinion was that the testimonies presented would not necessarily change the opinion by the Attorney General.

Mr. Aburano reminded the Commission that the Attorney General's opinion was the law was not so clear that the Attorney General's office felt that they could tell the Commission what to do as far as including or excluding the dependents of non-resident military. Rather, the Attorney General suggested that the Commission exercise its judgment on this issue giving due consideration to applicable laws, historical state policies, the precedents of prior commission actions, the provisions of the 1992 constitutional amendment, and the history of that amendment.

Mr. Aburano noted that none of the laws or cases in the AG's opinion has changed since the opinion was given. What has happened is that

the Commission heard testimony at the public hearings which indicated that many members of the public did not believe that military dependents should be included in the population base. Some of the public cited court cases in support of their testimony, but Mr. Aburano noted that their citations were not entirely accurate or complete.

Mr. Aburano reported as to the Commission's request that he look at the State's election laws as they pertained to the issue of the dependents of non-resident military. He noted that the statutes do not say that the dependents of non-resident military cannot be residents of the State; nor do they say that such dependents cannot be qualified to vote. The statutes simply removes any presumption that might attach the fact that they are residing in Hawaii.

Mr. Aburano gave the following background on the voter registration statutes. In the State Constitution, it is stated who can be a voter. One of the four qualifications of a person to become a voter is that the person has to be a resident of the State for not less than one year preceding the election. Regarding the military, because they usually live in Hawaii for more than one year, this constitutional provision could be interpreted to create a presumption that they are residents who are qualified to vote. It appears that Hawaii Revised Statutes §11-13 was created to remove that presumption and focus on the issue of the intention of the military and their dependents, i.e., to require them to show that rather than just physical presence, they have a concurrent intention to be a permanent or legal resident of the State of Hawaii. Thus, the statutes still focus on the intention of the military dependents in determining whether or not they can register to vote.

Mr. Aburano also mentioned that the laws that have been presented to the Commission are election laws. There is no indication that any of these laws or statutes have any meaning for reapportionment. The rules for residency in HRS §11-13 state that they are for "election purposes only". The rules do not say that they are for reapportionment also. HRS §11-13 and its rules are not in the reapportionment section of the State's statutes. As such, there is a question as to whether or not one can register to vote has any meaning as to whether or not one can be included in the reapportionment population base.

Mr. Aburano noted that if qualifications to be a resident and to be a voter were equal to being part of the population base, there would have been a different result in the Travis v. King case. The Court in that case threw out the registered voter population base as not being a constitutionally permissible population base. As such, one cannot say that simply because some people are not qualified to be a voter in the State that they cannot be part of the reapportionment population base. In this

regard, Mr. Aburano noted that minors are not qualified to vote, but are included in the reapportionment population base.

Mr. Aburano stated that where HRS §11-13 and its rules of residency might have some impact on the reapportionment process is in the fact that the rule could be further evidence of a historical state policy concerning the inclusion of military and their dependents for election and representation type purposes, i.e., the fear that the military and their dependents may have some distorting effect on voting in the State. It also shows that there is no presumption one way or the other as far as State law is concerned as to whether permanent residents include military dependents.

Mr. Aburano pointed out that under the common law, there is a presumption that a person retains their domicile/legal residence until they exhibit an intention to change it. There are some Hawaii cases that have held that in order to change one's residence, one has to: (a) establish a physical presence at a new location, (b) have the intention to be a resident at the new location, and (c) have the intention to abandon one's former residence. In the common law there is a presumption that people retain their former residence when they move from one place to another until they show their intention to change it. Again, Mr. Aburano cautioned that although it is in the common law, this presumption might not necessarily apply to reapportionment.

Roll Call:

Chairperson Minami reread the motion to exclude the dependents of non-resident military from the reapportionment population base.

Commissioners Akiona, Frierson, Jim On and Lum and Chairperson Minami voted in favor of the motion. Commissioners Hoo, Kinney, Masumoto, and Rae voted against. With a five (5) to four (4) vote, the motion carried.

The Commission will exclude the dependents of non-resident military from the population base that it will use to reapportion and redistrict the state legislative districts.

#### 4. Motion to reconsider the population base

Commissioner Masumoto moved to have the Commission reconsider the current population base and include all active duty military personnel and their dependents in the population base that it uses to reapportion and redistrict the state legislative districts. Commissioner Rae seconded the motion.

Discussion:

Commissioner Frierson asked for clarification that whether the Commission will be voting to reintroduce into the population base the active military. Her question was answered in the affirmative.

Roll Call:

Commissioners Hoo, Kinney, Masumoto, and Rae voted in favor of the motion. Commissioners Akiona, Frierson, Jim On and Lum and Chairperson Minami voted against the motion. With a five (5) to four (4) vote against the motion, it failed.

The Commission will not include all active duty military personnel and their dependents in the population base that it will use to reapportion and redistrict the state legislative districts.

B. Calculating Reapportionment by Basic Island Unit

Chairperson Minami stated that the Deputy Attorney General is going to be given the opportunity to advise the Commission on the legality of the approach that it is considering to calculate deviations in its proposed plans and to clearly list it on the agenda as a decision making issue.

Deputy Attorney General, Mr. Brian Aburano, stated that he will be addressing two topics on the new proposed method of calculating deviations.

1. The method that is being proposed.

The method of calculation that is being proposed is the same or similar to the method that was used by the United States District Court in a case called Burns v. Gill (1970). It was used to approve a plan that was put together by the 1968 Constitutional Convention. Mr. Aburano cautioned relying on this case to validate the method of calculation since it did not appear to be a contested case, but more of an uncontested court confirmation on the 1968 Constitutional Convention's reapportionment plan.

The same or a similar method was also used by the 1981 Reapportionment Commission when it drew its plan. The plan was struck down by the Travis v. King case. The court did not use the methodology that is being proposed now in order to analyze the 1981 Reapportionment Commission's plan but used the more "standard" methodology of calculating deviations that the 2001 Reapportionment Commission was previously using.

Based on the cases that he has seen to date, Mr. Aburano stated that nearly all of the recent federal and state court decisions do not use the methodology of calculating deviations that is being proposed, the courts use



the more "standard" methodology that the 2001 Reapportionment Commission was previously using. However, he mentioned that he had not seen any court decisions that say that the new proposed methodology for calculating deviations cannot be used.

2. Maximum deviations that are permissible.

Mr. Aburano mentioned that it was noted in the Reynolds v. Sims decision that you cannot use a methodology for calculating deviations that masks an unconstitutionally large deviation.

In Reynolds v. Sims, the Supreme Court held that it does no good to apportion only one house on a population basis if the method of apportioning vote in another house would be submerged, which brings up the issue of maximum deviation. If the court does not agree with the Commission's method of calculating deviation and wants to analyze what has been done under the more standard methodology, the Commission would have to be concerned about what the maximum deviation would be on the other side.

The Supreme Court has stated that in analyzing a reapportionment plan, one must look at the total plan. Minor inequities in representation in certain areas can be balanced off by apportionment in another house. In other words, slight over representation in one house can be balanced by minor under representation in the other house. The Court has also said that a state can justify some population deviations between legislative districts based on rational state policies consistently applied. But, Mr. Aburano said that that does not mean that deviations of any size can be justified. Mr. Aburano also noted that courts have stated that deviations that may be justifiable in one state or set of circumstances may not be justifiable in another state or set of circumstances.

Mr. Aburano stated that many courts have indicated a 16.4% deviation as being the possible maximum deviation that the U.S. Supreme Court would find permissible. He read off a list of court cases that had struck down plans with deviations more than 16.4%. Mr. Aburano noted that the only real guidance that the U.S. Supreme Court had given to other courts is the 10% deviation guideline. Mr. Aburano cautioned that in several court cases, reapportionment plans have been struck down because the states involved were not able to offer rational reasons for the deviations in the plans. He also mentioned that courts look to see if deviations in reapportionment plans are justified by a rational state policy that has been consistently applied. In Hawaii, the last couple of plans did not keep political subdivisions intact as opposed to having canoe districts.

In summary, Mr. Aburano stated that there is nothing that states that the Commission cannot use the proposed method of calculation, but there are

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risks if the alternative method produces deviations that exceeds 16.4% and are in the 20-30% range. Again, the courts have said nothing definitive as to how large of a deviation may be found constitutional or unconstitutional.

Chairperson Minami moved that the 2001 Reapportionment Commission shall utilize an alternative methodology that calculates deviations in the legislative district reapportionment plan by Basic Island Unit. Commissioner Frierson seconded the motion.

Discussion:

1. Commissioner Frierson asked to speak in favor of the motion. She feels that it is basically fair. There seems to be a general agreement between the Commission and the public that canoe districts are an abomination and that they don't work. There has been no real attempt made to build a plan that will end canoe districts but also provide fair representation. She feels that it is done by combining over representation in one legislative body and under representation in another. Commissioner Frierson said that she feels it would be a disservice to everybody if the Commission did not try to create a plan without canoes.
2. Commissioner Masumoto stated that two wrongs don't make a right. He feels that since a constitutional issue has already been raised regarding the population base, the second constitutional issue should also be raised. The second issue being the conflict between the State Constitution, which states that apportionment should be based on basic island units, and the Federal Constitution interpretation of equal representation.
3. Commissioner Jim On spoke in support of the motion saying that it might amount to a rational state policy. He also felt that if the Commission's plan does go to court, that there is a basis and reason supporting it considering all the testimonies that have been accepted by the Commission.
4. Commissioner Rae spoke against the motion. He is concerned about the equality of representation. Although the Commission has heard testimony that the public does not mind being under represented in one house if they were over represented in another, he is concerned that it will reflect the broadest concept of representation. Not knowing what the deviations are going to be and the uncomfortability of it, it bothers him enough to vote against the motion.
5. Commissioner Hoo asked the Commission's legal counsel in terms of the proposed method of calculation, if there is any thing that the Commission is doing that is contrary to state law in terms of how districts should be reapportioned. The Commission's legal counsel mentioned

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that he is not aware of any violation of state law as far as the proposed method of calculation concerned.

Chairperson Minami stated that the State Constitution says that the legislative districts shall not extend beyond the basic island unit. He explained that the proposed method of calculation attempts to utilize the State Constitution provisions as justification for the plan that will be presented.

6. Commissioner Kinney stated the issue regarding the military dependents was a moral issue with him. He mentioned that he will cast his vote in favor of the recommendation to calculate by basic island unit because like Puna, towns are entitled to their own representation. They are the Neighbor Islands and in all fairness he is in favor of doing it by basic island units.
7. Commissioner Hoo stated that this point is where the Democrats are split in their decision. In talking to the Deputy Attorney General, she feels that it is a very risky step. Personally, she does not like canoe districts, but the concern is the possibility of people filing suit against the Commission. Commissioner Hoo will vote against calculating by basic island unit.

Roll Call:

Commissioners Akiona, Frierson, Jim On, Kinney, Lum and Masumoto, and Chairperson Minami voted in favor of the motion. Commissioners Hoo and Rae voted against the motion. With a seven (7) to two (2) vote, the motion carried.

The Commission will utilize an alternative plan that calculated deviations in its legislative district reapportionment plan by basic island unit.

**VII. Correspondence and Announcements**

Chairperson Minami noted receipt of the following correspondence:

- ?? Testimony from Burton Goldenberg
- ?? Testimony from Lawrence Moore
- ?? Testimony from Pat Hunter-Williams
- ?? Testimony from Peter Martin
- ?? Testimony from J. Tyler Lee
- ?? Testimony from Jeff Falkner
- ?? Testimony from Joseph Pluta
- ?? Testimony from Daniel Grantham
- ?? Testimony from Beryl Blach

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- ?? Testimony from Kevin Mulligan
- ?? Testimony from Andrew Nakagawa
- ?? Testimony from Jeanette Nekota - Mililani Mauka/Launani Valley Neighborhood Board
- ?? Petition from the residents of Lower Kapahulu
- ?? Recommendations from Office of Elections - changes to plan for election purposes
- ?? Opinion letter from Deputy Attorney General, Aaron Schulaner - military dependents issue raised by Ms. Schafer & Federal Aid issue raised by Kona residents

**VIII. Other Business**

- A. Testimony of Ms. Madge Schaefer, Maui Advisory Council Member

Ms. Schaefer requested to testify after the decision making process.

Ms. Schafer expressed her gratitude toward the Commission for their time and for listening to the public and what they had to say.

Commissioner Rae thanked Ms. Schaefer for her diligence in the matters that were brought. He stated that what is important in the democracy is that everyone is allowed to disagree and do in within the context of the law.

- B. Chairperson Minami outlined a tentative timetable for the Commission and public to keep in mind.

1. It will take about 1 1/2 weeks for the consultants to extract the military dependents from the population base.
2. The Technical Committee will meet and redraw the legislative districts.
3. The Technical Committee will present the plan to the whole Commission and then take the plan to the public.
4. The Advisory Councils on each island will be asked to hold informational meetings and try to find out where the neighborhood boundary lines are and if accommodation is possible the Commission will try to do so.
5. It is possible that the final plan will come in effect in December. Although it does exceed the timetable set forth in the constitution, the only alternative is for the court to draw the lines and he feels that they would welcome the effort that the Commission is trying to come up with a reapportionment plan.

- C. Commissioner Hoo stated that despite the fact that the votes were split among party lines, it does not reflect at all the working relationship that the

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Commission has amongst each other. There is a camaraderie present now and will continue to be there. Being stranded in Hilo helped the Commission become closer.

Commissioner Kinney stated that the process has been bipartisan and the Commission has been working together very well and will continue to do so. Chairperson Minami has kept the group together, working and moving in the direction. Whether they agree or disagree, the Commissioners are working for the citizens of Hawaii.

- D. Ms. Betty Chandler asked the Commission about the process and instructions that the Advisory Councils will need to follow prior to the public hearings. Chairperson Minami stated that it has not been clearly defined, but it is the Commission's ideal is to take advantage of the Advisory Councils.

**IX. Adjournment**

There being no other business to discuss the Eleventh Meeting of the 2001 Reapportionment Commission was adjourned.

The Tenth Regular Meeting of the 2001 Reapportionment Commission was adjourned at 4:00 p.m.

Respectfully submitted,

Dwayne D. Yoshina  
Chief Election Officer  
Secretary of the  
2001 Reapportionment Commission